

# To My Russian Colleagues

by Hon. B. Lynn Winmill

I want to express my thanks to our guests from Russia for their presence here, and the great opportunity that they have provided us here in Idaho to learn of their culture and legal system. From time to time during our proceedings perhaps you have heard me say that I believed that we would derive more benefit from your visit than we can ever provide you.

I firmly believe this. During our press conference on the first day of our sessions, one of the reporters put me on the spot and asked me to explain this statement. I explained to her that I believe we have been the great beneficiaries of this experience in at least two ways. First, we have learned directly from you as you have explained your involvement in the implementation of judicial reform, including the critical scrutiny of the strengths and weaknesses of your judicial system that you have undertaken, and the difficulties encountered in implementing that reform. Second, we have learned indirectly, as our discussions with you have forced us to engage in the same type of critical scrutiny of our legal system—leading us to ask hard questions about the wisdom of civil jury trials, the perils of a criminal justice system that depends upon plea bargaining for its survival, and the challenges of dealing with a society which has grown increasingly litigious. For this educational opportunity—for this chance to reflect upon and ponder the strengths and weaknesses of our legal system—I thank you.

This self-reflection and scrutiny began even during the planning stages for this conference. During one of our planning sessions, I commented that the confidence the American public has in our judiciary and our judicial system is one important characteristic of our legal system and our society. Having had little opportunity to visit other countries and examine their legal systems, I don't know if we are unique in this regard. However, I do know that the public's respect is critical not only to our judicial system, but to the very operation of our democratic form of government.

Justice Samuel Miller, of the United States Supreme Court, observed more than 120 years ago, that judicial power, "rest[s] solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the ... protection of rights guaranteed by the Constitution ... and on the confidence reposed in the soundness of their decisions and the purity of their motives."

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These sentiments were echoed just 18 months ago during the crisis created by the 2000 Presidential Election, when Justice Stevens of our Supreme Court observed, in his dissent in *Bush v. Gore*, that—"It is the confidence in the men and women who administer the judicial system that is the true backbone of the rule of law." In any event, having offered that comment to our

planning committee, they suggested that I speak to you on this topic. I apparently have not learned, that it is wise to keep one's mouth shut during planning meetings.

As I have reflected over the last few weeks on the question: "Why does the American public have such confidence in its judiciary?" I have reached a couple of firm conclusions. First, I am certain that it is not because the judges

who have donned robes and presided over a trial, are all, without exception, brilliant, fair, and ethical. In every bushel there are a few bad apples. Hopefully, the instances where our judges are less than brilliant, fair, and ethical are few. Nevertheless they do exist. Second, I am equally certain that the answer to that question is neither simple nor unitary. Rather, the answer lies in a number of characteristics of our society and developments in our history. My purpose today is to explore a few of those circumstances and perhaps encourage both our Russian guests and the American participants in this program to reflect on this difficult issue.





Let me begin, by suggesting that one significant factor which bears upon the American public's confidence in its legal system, is the restraint the

judiciary manifests in the exercise of its tremendous power. However, the restraint of which I speak is not the philosophical dispute which has divided our Supreme Court between those who would interpret the Constitution strictly, and those more willing to infer rights not expressly mentioned. Rather, it is a judicial restraint that requires more than a simple choice between competing judicial philosophies. It requires the judiciary to recognize and respect the restricted role it must play in our system of governance, while not forgetting the active role it must play in the balance of powers established by our Constitution. It must "lend its ears" to the body politic, but not succumb to the momentary swings of mood and disposition which characterize democracy at its worst. In short, judges must act as statesmen, as well as jurists—interpreting the laws and the Constitution without regard for the majority of today or the minority of tomorrow, but also with an eye to the effect of its decision on our broader society.

Interestingly enough, that perception of judicial restraint requiring statesmanship was articulated 170 years ago by a French Magistrate, Alexis de Tocqueville, who traveled to this country to observe democracy first hand. His observations were later recorded in his book, *Democracy in America*, in which we read:

"Not only must the Federal judges be good citizens, and men of that information and integrity which are indispensable to all magistrates, but they must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off, and the supremacy of the Union and the obedience due to the laws along with them."



There have been times in our history when the judiciary has gone astray and lost sight of its obligation to exercise restraint. At times, that failure has been tragic. Indeed, our Supreme Court's decision in the Dred Scott case, successfully removed the preeminent moral issue of the day—slavery—from the political process, but thereby guaranteed a bloody civil war. In that case, the Supreme Court lost sight of the limited role it must play in society—with tragic results. However, where the Courts have failed to exercise restraint, the body politic has asserted itself, through public debate, the electoral process, and even civil war, to restore the proper checks and balances of our constitutional system.

These lessons of history have not been lost on our judiciary, on those responsible for selecting judges, or on the American public. The debate continues, and charges are still heard that a particular judge or court fails to exercise adequate restraint. The importance of this debate is that it exists. Having adopted judicial restraint as a necessary trait of our judicial system, this public dialogue has gone far to enhance the legitimacy of the judiciary and the American public's esteem.

A second theme of American society which adds to the stature of the judiciary, is our historic commitment to the rule of law. From the very birth of our country, the rule of law has provided a consistent thread and theme in our society. Our separation from England 226 years ago was precipitated, in large part, by outrage over violations of that principle. The constitutional system of government which we erected to replace the English monarchy embodied that principle. Over time, the rule of law became a matter of faith on the part of our citizenry, on a par with the tradition of our revolutionary origins. "The principle that our Government shall be of laws and not of men," Justice William Brennan wrote in a 1971 opinion, is "strongly woven into our constitutional fabric .....

Significantly, through the structure of the Constitution and the early decisions of our Supreme Court, such as *Marbury v. Madison*, our judiciary has assumed the role of guardian of the—rule of law. As Justice Tom Clark of the U.S. Supreme Court observed in 1965,"the ultimate guardian of individual rights is the rule of law and its most important aspect is an independent court system."

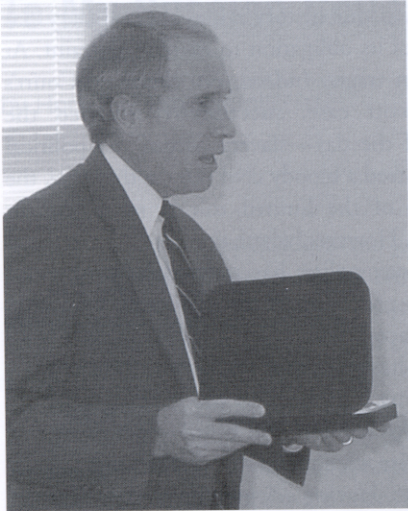
Of course, the importance of the task with which the judiciary has been charged—keeping safe the bedrock principle of our democratic experiment—does not necessarily explain the confidence shown. However, if only because we most fervently hope and pray that it is true, Americans have come to believe that the institution charged with safeguarding and protecting its most valued principle is worthy of that responsibility.

However, I believe that our citizenry's belief in the judiciary is based on more than hope and prayers. It also is based upon the unique opportunity for citizens to observe and participate in the legal system when they become jurors. This effect upon our citizens was first observed and noted by that astute outsider, Alexis de Tocqueville.

has become visible. It reveals strategic thinking that, when fully implemented, can make the University of Idaho College of Law the new small state law school in America.

• Elevating the academic profile and diversity of incoming classes through targeted recruitment and increased financial aid.





De Tocqueville observed that the judiciary, along with the bar, was the true aristocracy in American society. The power of judges, Alexis de Tocqueville observed,

"is enormous, but it is the power of public opinion. They are powerful as long as people respect the law; but they would be impotent against popular neglect or contempt of the law."

In considering why the American public respected the courts and the law, de Tocqueville observed, somewhat paradoxically, that this respect derived, in large part, from the judiciary's sharing its role with the public. In de Tocqueville's view, the American jury system played a critical role in creating public respect and support for the judiciary and the rule of law. This occurs, in part, because the jury is raised, albeit temporarily, to the status of the judge. As the judge of the facts of a case, they also participate in protecting and safeguarding the rule of law. In de Tocqueville's words:

"[T]he institution of the jury raises the people itself... to the bench of judges ... [and] invests the people... with the direction of society. The jury ... invests each citizen with a kind of magistracy; it makes them all feel the duties which [judges] are bound to discharge towards society."

By participating in the court system, not as a passive observer, but as an active participant, the citizen "buys into" and obtains a personal interest in the legitimacy of the legal system, the judiciary, and the rule of law. Again, borrowing from de Tocqueville:

"The jury, then, which seems to restrict the rights of the judiciary, does in reality consolidate its power, and in no country are the judges so powerful as where the people share their privileges."

I have observed this phenomenon first hand in the fourteen years that I have been on the bench, and the hundreds of jury trials over which I have presided. After each jury trial, I take a few minutes to visit with jurors and answer their questions. In every instance and without exception, the jurors report how rewarding the experience has been and the new respect they have for the legal system and the difficult role a judge must play in promoting justice and protecting the rights of our citizens.

I am confident that as this message goes forth from our jury rooms into the barbershops, the hair salons, and the coffee shops of America, it becomes a part of our American experience. In this manner, as de Tocqueville observed,

...[t]he jury ... serves to communicate the spirit of the judges to the minds of all the citizen and this spirit with the habits which attend it is the soundest preparation for free institution it imbues all classes with a respect for the thing judged, and with the notion of right."

In my experience, de Tocqueville's observations of 170 years ago are still true today. I firmly believe that the American jury system, guaranteed by our Constitution, is a major reason why the judiciary enjoys the respect that it does.

In closing, let me express my appreciation for this experience. Over the last seven days, I have had the opportunity to break bread, to rub shoulders, and to discuss common problems with my Russian colleagues. I have observed them to have the statesman-like qualities referred to by de Tocqueville. I have learned, first hand, that they have a commitment to the rule of law which makes them worthy guardians of that principle in their political system. As they now embark upon the important process of creating a jury trial system in the Russian Federation, I envy them the great opportunity that will be theirs—to be midwives at the birth of the jury system in their country. I am confident that they will find, as I have over the last fourteen years, that jury trials will convert their courtrooms into classrooms—a place where their citizens will learn, through participation, about the values of democracy, the greatness of their legal institutions and the deference owed to the rule of law. I admire them for their commitment to this process and wish them well in their endeavor.

*These remarks were made on August 8, 2002 on the occasion of a visit by five top Russian judges—including a justice of the Supreme Court of the Russian Federation—who spent August 3-10, 2002, in Boise studying the U.S. federal and state court systems with their Idaho counterparts and other members of the Boise legal community. The Russian judges are part of a high-level rule of law exchange sponsored by the **Open World Program**, the only exchange program housed in the U.S. legislative branch. Russia's recent adoption of major judicial reforms proposed by President Vladimir Putin made the judges' visit to Idaho especially timely. Judge Winmill was their official host.*



*On July 1, 1999, B. LYNN WINMILL became the Chief Judge of the United States District Court. Judge Winmill is currently serving on the Ninth Circuit Article III Judges Education Committee. He graduated from Idaho State University in 1974 and from Harvard Law School in 1977. He was recently appointed by Chief Justice Rehnquist to serve on the Information Technology Committee for the Judicial Conference of the United States.*